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Supreme Court of the United States

OCTOBER TERM, 1960

No. 96

JOHN M. KOSSICK,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF FOR RESPONDENT

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On the Brief

New York, N. Y.
November 18, 1960

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Facts and Proceedings Below

Petitioner's presentation is incomplete and misleading. The allegations upon which he bases his claim are that, in 1949, while employed on respondent's vessel as Chief Steward, he became ill; in August 1950, upon his being discharged from the vessel, respondent offered him a master's certificate to go to the United States Public Health Service Hospital for treatment; he preferred to continue treatment with his private physician and told respondent that he would pay the doctor's bills if respondent would pay maintenance; respondent told petitioner that it would not pay him maintenance unless he went to the Public Health Service Hospital; petitioner agreed to go there for his treatment and respondent orally agreed to pay him for any injuries resulting from said treatment [respondent denies any such agreement]; following his admission to the Public Health Hospital on August 28, 1950 he was seriously burned and thereby became disabled. For these injuries he claims damages of $250,000 (R. 2-6, 16-19).

There is no claim of negligence or unseaworthiness as to the cause of petitioner's illness and any claim of such was expressly waived (R. 19).

Respondent moved to dismiss the cause of action for damages for injuries inflicted upon petitioner by the Public Health Service on the ground that it is unenforceable by reason of the Statute of Frauds. Bicks, *D.J.*, noted that:

> "• • • the first count is bottomed on contract and not on unseaworthiness or the Jones Act. This is not an oversight but rather a strategem to resuscitate a claim time barred under the Jones Act. • • • The amended complaint also contains a count for maintenance and cure. The sufficiency of that count is not questioned upon the instant application" (R. 8).

In a scholarly opinion the Court held that inasmuch as respondent's alleged oral promise was to answer for the debt, default, or miscarriage of another, the Public Health Service, it was unenforceable by reason of the New York Statute of Frauds (R. 7-14). *Kossick* v. *United Fruit Company*, 166 F. Supp. 571.

Following this decision petitioner discontinued, without prejudice, his second alleged cause of action, for "the expenses of his maintenance and cure" (R. 6, 14).

On appeal petitioner did not seriously dispute Judge Bicks' view as to the effect of the Statute of Frauds but made for the first time the argument that respondent's alleged promise was a maritime contract and that to allow it to be affected by the New York Statute of Frauds would work an irreparable injury to the uniformity of the admiralty law. The Court of Appeals, Magruder, Medina and Friendly, *C.JJ.*, had no difficulty in seeing that the alleged contract is not maritime, saying:

> "The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment" (R. 22).

The decision is reported. *Kossick* v. *United Fruit Company*, 275 F. 2d 500.

Questions Presented

The questions proffered by petitioner (pp. 1-2) are not involved at all. The complaint alleged two causes of action. The second, for the expense of maintenance and cure, has been discontinued, without prejudice. The first, for damages for the injuries caused by the Public Health Service, has been dismissed on one ground only, *viz.*, it is based upon an alleged oral agreement to answer for the debt, default of miscarriage of another, and therefore is not enforceable because of the Statute of Frauds. The Courts below made none of the bizarre holdings attributed to them by petitioner, e.g., that a seaman's right to the expenses of his maintenance and cure is not a maritime right (brief, pp. 3, 8); that respondent's obligation to pay the expenses of petitioner's maintenance and cure terminated when he entered the Public Health Hospital and did not continue until he had received the maximum benefit of treatment (brief, pp. 10, 13). The Courts below held none of these things. They held only one thing, and only one question is presented by the record here, *viz.*:

Is an alleged oral promise by a shipowner to pay damages for injuries that a seaman may sustain while being treated at a Public Health Service Hospital enforceable despite the Statute of Frauds?

Summary of Argument

I. Respondent's alleged oral promise to answer for the negligence of the Public Health Service was, as the Courts below held, "a special promise to answer for the debt, default or miscarriage of another person," and unenforceable by reason of the New York Statute of Frauds.

II. This alleged promise was, as the Court of Appeals correctly held, a promise made on land, to pay money on land, if petitioner should suffer injury, on land, in the course of medical treatment, on land, and was not maritime in nature.

III. The uniformity doctrine fathered by *Southern Pacific Co.* v. *Jensen* has lost much of its initial vigor and the states are permitted wide latitude in the maritime field. Even if the contract here alleged were maritime, uniformity would not be impaired by applying the statute of frauds because all fifty states have the statute or its substantial equivalent.

IV. The shipowner's duty to provide maintenance and cure does not require payment of damages for injuries or illness, or conscious pain and suffering, and the shipowner is not liable for injuries inflicted in the course of treatment by a recognized public institution such as the United States Public Health Service hospital.

I.

Both courts correctly applied the Statute of Frauds.

The basis of the decisions below was that the primary obligation to pay petitioner the damages he seeks is that of the Public Health Service whose negligence caused the injuries, and that respondent's alleged promise was, therefore, plainly one to answer for the debt, default or miscarriage of another. As Judge Bicks said:

> "The primary obligation to which this undertaking related, was the duty of the hospital and its employees, to exercise due care in treating plaintiff" (R. 10).

We cannot improve upon Judge Bicks' studious and thoroughly supported analysis (R. 9-13). He considered *Bulkley* v. *Shaw*, 289 N. Y. 133, which petitioner cites (brief, p. 11). But petitioner loses his way, transposing the terms "promisor" and the "original debtor." As Judge Bicks said:

> "Plaintiff characterizes the defendant's alleged undertaking as an 'original' promise and from that premise proceeds to argue that it is out of the statute. The use of the terms 'original' and 'collateral' is not very helpful because they are not clearly defined . . . .
>
> "Where the promisor comes under an independent duty of payment irrespective of the liability of the principal debtor and the undertaking is founded on a new consideration moving to the promisor and beneficial to him, the undertaking is said to be 'original,' whereas if it is to answer for the debt, default or miscarriage, of another it is characterized as 'collateral.'" (R. 10-11).

It is essential to bear in mind that the alleged promise upon which petitioner bases his claim is not a promise to pay maintenance and cure but a promise to pay compensatory damages if the Public Health Service should hurt him. The distinction is vital to a correct understanding and petitioner consistently confuses the two. Bearing in mind that the claim is based on a promise to pay damages if the Public Health Service should hurt him, plainly respondent's alleged promise is collateral to the original duty of the Public Health Service to pay petitioner damages for injuries inflicted by its negligence. Judge Bicks rightly concluded:

> "The New York Statute of Frauds precludes enforcement of the defendant's alleged oral promise. The issuance of the master's certificate to plaintiff and his use thereof to gain admittance to and utilize the facilities of the marine hospital did not constitute the shipowner an indemnitor against malpractice by or at that institution" (R. 13).

In the Court of Appeals, petitioner substantially abandoned this point. His entire brief concerning it consisted of the following words: "The Statute of Frauds has no applicability to the case at Bar." The Court of Appeals said:

> "The basis of federal jurisdiction being alleged to depend on diversity of citizenship, the district judge thought that the contract sued on had to be governed, as respects its validity, by the New York Statute of Frauds, which provided in N. Y. Personal Property Law §31(2) that every agreement is void, unless it is contained in a memorandum signed by the party to be charged, if such agreement '[i] s. a special promise to

answer for the debt, default or miscarriage of another person' " (R. 21).

The Court then considered the principal point urged by petitioner, *viz.* that a maritime contract cannot be nullified by a State Statute of Frauds because to do so would destroy the uniformity of the maritime law. We now turn to this point.

II.

The alleged contract in suit is not maritime.

No one doubts that the shipowner's duty to pay the expenses of maintenance and cure is maritime, but petftioner evades the issue. His claim is not based upon any alleged failure to provide maintenance and cure. The District Court held that "when defendant tendered plaintiff a master's certificate (which plaintiff accepted and used) its obligation to furnish cure was discharged" (R. 12), and petitioner has discontinued, albeit without prejudice, his alleged cause of action for failure to provide him "with the expenses of his maintenance and cure" in the amount of $30,000 (R. 6, 14).

As the Court of Appeals said, the contract here

> " . . . was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment" (R. 22).

It remains to consider whether such a contract is maritime. The Court of Appeals held that it is not (R. 22).

In *People's Ferry Company of Boston* v. *Beers*, 20 How. 393, this Court said:

> "The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching the rights and duties appertaining to commerce and navigation" (p. 401).

In *Insurance Company* v. *Dunham*, 11 Wall 1, this Court said that

> "And whether [the contract be] maritime or not maritime depended, not on the place where the contract was made, but on the *subject-matter* of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court" (p. 29).

This Court's application of the rule in those two cases highlights the distinction. In the former it held that "The contract is simply for building the hull of a ship, and delivering it on the water" (p. 401); hence not maritime. In the latter it held that a contract of marine insurance is maritime because

> "* * * if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract, or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained" (p. 30).

Respondent's alleged agreement, however, was not a guarantee that petitioner would "pass safely over the sea," etc.; it guaranteed nothing maritime whatsoever, but only that physicians, ashore, would treat petitioner, ashore, with due care.

Numerous subsequent cases apply the rule and the distinction expressed in *People's Ferry* and in *Insurance Company. North Pacific SS Co.* v. *Hall Bros.*, 249 U. S. 119; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; *Pacific Surety Co.* v. *Leatham*, 151 Fed. 440 (7 Cir.); *Eadie* v. *North Pacific SS Co.*, 217 Fed. 662; *Berwind-White Coal Co.* v. *City of New York*, 135 F. 2d 443 (2 Cir.).

Pacific Surety Co. v. *Leatham*, 151 Fed. 440 (7 Cir.), is in point. There Pacific agreed to pay any damage sustained from its principal's breach of a maritime charter and the question was whether such an indemnity agreement was maritime in nature. The Court held it was not, saying,

> "The direct subject matter of the suit is the covenant to pay such damages, which neither involves maritime service nor maritime transactions, and we are of opinion that the mere fact that the event and measure of liability are referable to a charter party does not make the bond a maritime contract nor make its obligation maritime in the jurisdictional sense" (p. 443).

In *Cie Francaise de Navigation A Vapeur* v. *Bonnasse*, 19 F. 2d 777 (2 Cir.), Bonnasse gave a general average bond but resisted suit against it on the bond on the ground that its agreement was not maritime. The Court held that it was maritime and the reasons given, as in *Insurance Company* v. *Dunham*, demonstrate why respondent's alleged agreement here was not maritime. Bonnasse's bond was given to release the cargo from a maritime obligation, i.e. to pay general average, and this Court held that Bonnasse's bond was maritime because Bonnasse thereby assumed the maritime obligation of the cargo to pay general average. The Court distinguished *Pacific Surety Co.* v. *Leatham, supra*, and like cases, saying,

"Jurisdiction is refused in such cases on the ground that the surety has not agreed to perform the principal's maritime obligation, but merely to pay a sum of money in case of his default" (p. 778).

So here; respondent's alleged promise is not to do anything, but merely to pay money if the Public Health Service should injure petitioner in breach of its non-maritime duty to use due care.

Four other cases where the Courts have considered matters peripheral to affairs truly maritime are apposite. *Clinton* v. *Int'l Org. of Masters,* 254 F. 2d 370 (9 Cir.) was an action by a seaman against his union to recover damages for an alleged failure to allot jobs fairly. The jobs were seamen's, hence maritime. However, the Court held that the claim for failure to allot maritime jobs fairly was not maritime, quoting from *Benedict on Admiralty*:

"It is believed that a sure guide, in matters of contract, is to be found in the relation which the cause of action has to a ship, the great agent of maritime enterprise, and to the sea as a highway of commerce."

As to the contract sued on, the Court said:

"• • • It is, in short, a labor contract, entered into upon the land, to be performed upon the land, and breached, if at all, upon the land" (p. 372).

In *Goumas* v. *K. Karras and Son,* 140 F. 2d 157 (2 Cir.), libellant claimed he had been hired by respondent to provide a crew for respondent's vessel; that he had done so and sent the men to Montreal; that the vessel was in such unseaworthy condition that the men refused to serve and the libellant had suffered considerable expense and damage by reason of respondent's breach of his agreement. The

Court dismissed the libel on the ground that the contract, on one hand to procure a crew and on the other to provide a seaworthy vessel, was not maritime in nature.

In *Mulvaney* v. *Dalzell Towing Co.*, 90 F. Supp. 259, petitioner's attorney ingeniously attempted to circumvent the Statute of Limitations by alleging a contract to settle a claim for a maritime tort so that the suit might be brought on the alleged contract to settle, after the lapse of the period for tort suits. The Court refused to be led astray and held that such a contract was not maritime.

In *Black Sea State SS. Line* v. *Association of Int. Tr. Dist.*, 95 F. Supp. 180, S. D. N. Y., libellant chartered its ship to Association effective upon libellant's receiving Moskowitz's letter guaranteeing payment of any demurrage charges. Association, without notice, cancelled the charter and libellant brought suit. Moskowitz denied that its guarantee was maritime and the Court sustained that position on the ground that Moskowitz's agreement did not undertake to do anything maritime but "merely agreed to make good any breach of the charter in this respect by the Association" (p. 182).

Petitioner cites *Union Fish Company* v. *Erickson*, 248 U. S. 308. But that contract was indisputably maritime, i.e. it was a contract for service as master of a vessel.

III.

The Statute of Frauds works no prejudice to the uniformity of the general maritime law.

The Courts below did not apply the Statute of Frauds to seamen's articles, or to the owner's duty to provide maintenance and cure, or to any familiar or characteristic feature of the maritime law. It was applied only to an alleged oral contract to pay damages for a doctor's possible malpractice, a special agreement not claimed to be customary and in fact unique. Nevertheless petitioner claims (brief, p. 5) that the decision below causes the Statute to impair some characteristic feature of the general maritime law. But he does not say what that feature is. There is no general maritime law as to the effect of oral contracts, such as the one in question. The application of the Statute of Frauds here, therefore, cannot contravene any precept of maritime law. Particularly it can not be said to destroy uniformity because every one of our 50 States has the same, or similar, statute requiring that agreements to answer for the debt or default of another must be in writing—see Appendix, *infra*, pp. 41, 42.

In *The Tungus* v. *Skovgaard*, 358 U. S. 588, this Court said that *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, "fathered" the "uniformity" concept (p. 594). In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, this Court said:

> "And plainly, we think, no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony or uniformity of that law in its international and interstate relations" (p. 216).

Since there is no maritime law as to whether such contracts as the one alleged here must be in writing, the Statute of Frauds does not prejudice any feature of the general maritime law. It does not interfere with proper harmony or uniformity because every one of the 50 states has the same or a similar statute.

In *Standard Dredging Corporation* v. *Murphy*, 319 U. S. 306, Mr. Justice Black said for a unanimous court that "the Jensen case had been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws" (p. 309). Since *Southern Pacific* v. *Jensen* this Court has refused to strike down State statutes as contravening the uniformity principle in many cases which come far closer to the borderline than this one.

In *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440, petitioner's vessels, operated on the Great Lakes, were subject to boiler inspection pursuant to Federal law and the regulations of the Coast Guard. Although they complied with all Federal laws and regulations in respect of their boilers, this Court held that a Detroit ordinance intended to control the amount of smoke emitted from the ships was applicable, valid and must be obeyed even though structural changes to the vessels would be required.

Similarly, in *Kelly* v. *Washington*, 302 U. S. 1, this Court held that a State statute requiring that certain vessels be submitted to the inspection of State inspectors was applicable and valid as applied to motor-driven tugs despite the fact that Congress had, by statute, set up a complete system of vessel inspection which exempted motor-driven vessels.

In *Hess* v. *United States*, 361 U. S. 314, the decedent was drowned in the Columbia River due, as alleged, to the negligence of persons operating the Bonneville Dam in fail-

ing to close sufficient spillways to minimize the flow of water where decedent and others were working. It was held that the case was one for decision under the maritime law and the lower Courts held that there was no such negligence as would make respondent liable under Oregon's Wrongful Death Act. Petitioner, however, claimed, under the Oregon Employers' Liability Law. Although that statute imposes a considerably stricter standard of duty than that imposed by maritime law, nevertheless this Court held it applicable. What price uniformity?

The Wrongful Death Acts of the states are far from uniform and each conflicts, in a sense, with the general maritime law because that law confers no right of action for wrongful death. Yet in *Hess* and in many other earlier decisions, this Court made it clear that it is not so important after all to maintain the maritime law uniform and unadulterated by State statutes.

In *Romero* v. *International Term. Co.*, 358 U. S. 354, this Court said:

> "It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases,

> even, at times, when they conflicted with a rule of maritime law which did not require uniformity. 'In the field of maritime contracts,' this Court has said, 'as in that of maritime torts, the National Government has left much regulatory power in the States.' Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law through our history" (p. 373-4).

Wilburn Boat Co. v. *Fireman's Ins. Co.*, 348 U. S. 310, is close to the mark. There a contract of marine insurance made in Texas contained a "warranty" of a type declared void by a Texas statute. The vessel was destroyed by fire. Another Texas statute provided that no breach of the provisions of a fire policy could be a defense unless the breach contributed to the loss—and it was clear that the breach claimed by the insurance company could not have contributed. This Court recognized that the insurance contract was maritime but held that the Texas statutes controlled and rendered the policy warranty invalid as a defense.

In *Just* v. *Chambers*, 312 U. S. 383, although according to maritime law the personal liability of a tort feasor does not survive his death, this Court applied the Florida Survival Statute to maritime causes of action for personal injuries. This Court stated that:

> "* * * the criterion applied in determining the validity and effect of the state legislation * * * is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction" (p. 391).

In *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, despite the Federal Judicial Code provision vesting District Courts with exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, this Court held valid a New York statute conferring upon its Courts jurisdiction to require specific performance of an agreement to arbitrate charter disputes contained in a maritime charter party and found no difficulty in distinguishing the uniformity doctrine of *Southern Pacific Co.* v. *Jensen* (pp. 124-5).

In *Jarka Corporation* v. *Hellenic Lines*, 182 F. 2d 916 (2 Cir.), a "firm" offer was made to do certain stevedoring work, i.e., maritime work. There was no consideration for the offer and its validity was therefore contested. However, the New York Personal Property Law, c. 41, §33(5), provides that "firm" offers shall be valid although given without consideration. The Court considered whether the *Southern Pacific Co.* v. *Jensen* doctrine of uniformity would be violated if the New York statute were applied and held that it would not and said:

> "In the famous case of Southern Pac. Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, and its progeny, the Supreme Court, over strong dissent, called attention to the necessit of uniformity in certain aspects of maritime law, and invalidated several state workmen's compensation acts which were said to interfere with that essential uniformity. In United States Nav. Co. v. Black Diamond Lines, 2 Cir., 124 F. 2d 508, certiorari denied Black Diamond Lines v. U. S. Nav. Co., 315 U. S. 816, 62 S. Ct. 805, 86 L. Ed. 1214, we left open the effect which the Jensen rule might have on the applicability of §33 of the N. Y. Personal Property Law to maritime contracts, though Judge L. Hand, dis-

senting, was already prepared to hold it applicable. But subsequent Supreme Court opinions made it clear that the present Court would apply the Jensen rule—and overlook state law—only with great reluctance. See Parker v. Motor Boat Sales, 314 U. S. 244, 247, 248, 62 S. Ct. 221, 86 L. Ed. 184; Davis v. Department of Labor and Industries of Washington, 317 U. S. 249, 252-256, 63 S. Ct. 225, 87 L. Ed. 246. Finally, in Standard Dredging Corp. v. Murphy, 319 U. S. 306, 309, 63 S. Ct. 1067, 1068, 87 L. Ed. 1416, Justice Black, speaking for a unanimous Court, said: 'Indeed, the Jensen case has already been severly limited, and has no vitality beyond th[illegible] which may continue as to state workmen's com[illegible]sation laws.' This is only a dictum, to be sure, but it is a dictum strongly stated, and already accepted as authoritative by this court in Guerrini v. United States, 2 Cir., 167 F. 2d 352, 355, certiorari denied 335 U. S. 843, 69 S. Ct. 65, 93 L. Ed. 393. We think that even in its greatest ascendancy the Jensen rule would not have prevented application of such a state statute as this, which regulates a matter in which uniformity is not necessary and which is not 'in conflict with any essential feature of the general maritime law.' Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 125, 44 S. Ct. 274, 277, 68 L. Ed. 582. In view of the latest Supreme Court pronouncements, we should certainly not extend the Jensen rule at this late date to a field in which it has not hitherto been applied. Thus we hold that the N. Y. Personal Property Law §33(5) is applicable here and hence that the offer of November, 1947, even though without consideration, bound plaintiff until thirty days after it had given notice of termination" (p. 919).

Petitioner's Authorities Distinguished.

We have no quarrel with the doctrine represented by petitioner's authorities (brief, pp. 5-8) but they do not touch the point involved here. We have referred to *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, supra, pp. 12-13.

Riley v. *Agwilines, Inc.*, 296 N. Y. 402, represents only the familiar doctrine that negligence causing death on a vessel afloat in the navigable waters of a state gives rise to a maritime cause of action under the applicable state death act. *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, only applies the same doctrine to personal injuries so sustained.

Pope & Talbot, Inc. v. *Hawn*, 346 U. S. 406 refused to apply to a maritime tort occurring in Pennsylvania the common law contributory negligence rule of Pennsylvania which would bar recovery completely. The reason, of course, was that this would destroy a basic characteristic of the maritime law that contributory negligence is not a bar but only goes to diminish recovery.

Cox v. *Roth*, 348 U. S. 207 and *Frame* v. *City of New York*, 34 F. Supp. 194, merely held that the 3-year statute of limitations period in the Jones Act may not be diminished by state statute or municipal ordinance.

Sorensen v. *City of New York*, 99 F. Supp. 411, affirmed 202 F. 2d 857 (2 Cir.), certiorari denied 347 U. S. 951, holds merely that a seaman's right to sue for wages is controlled by Federal statutes relating to seamen rather than by State or Municipal law.

Why petitioner cites *Romero* v. *International Term. Co.*, 358 U. S. 354, we do not know. At p. 384, to which petitioner refers, this Court holds only that neither the Jones Act nor the general maritime law of the United States is

applicable to the claim of a Spanish seaman against the Spanish owner of a Spanish ship on which he was employed.

Northern Star SS Co. v. *Kansas Milling Co.*, 75 F. Supp. 534, holds no more than *Union Fish Company* v. *Erickson*, 248 U. S. 308. In that case Erickson alleged that he had orally contracted in California to proceed to Alaska and there serve for a year as master of Union Fish Company's vessel. He alleged that he proceeded to Alaska and performed his duties under the contract until he was wrongfully discharged, and he sued for damages for breach of contract. The vessel owner claimed that the oral contract was invalid by reason of the California Statute of Frauds. This Court held that the contract was maritime and considered that the question was "can such engagement be nullified by the local laws of a State, where the contract happens to be entered into, so as to prevent its enforcement in an admiralty court of the United States?" (p. 312). This Court answered in the negative, saying:

> "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made" (p. 313).

This Court's comments, just quoted, distinguish that case completely from this.

In *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, this Court said, concerning the statute involved in *Union Fish Co.* v. *Erickson*:

"It was held invalid, because, as construed and applied, it attempted to modify the remedial law of the admiralty courts" (p. 124-5).

In both *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 at 241 and *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469 at 477, this Court, despite *Union Fish Co.* v. *Erickson*, affirmed "the power of a State to make some modifications or supplements" of and to the general maritime law (257 U. S. at 241), and that the general maritime law may be "modified or supplemented by State statutes" if they "work no material prejudice to the general maritime law" (257 U. S. at 477).

Judge Hough, a preeminent admiralty judge, writing of Admiralty Jurisdiction—Of Late Years, XXXVII Harvard Law Review 529, said:

> "A somewhat similar failure to stress force of custom, in maritime matters, is found in *Union Fish Co.* v. *Erickson*, where with obvious correctness the California statute of frauds was not permitted to defeat a shipmaster's libel for wrongful discharge from an engagement for more than one year. But the ground of decision should have been the simple one that such engagements, orally made, were as old as the history of marine customs, had passed into the maritime law of the United States, and would be recognized and enforced by the courts of the nation,—so that what California said on the subject (if anything) was merely immaterial" (p. 537).

Of course no custom is involved here—the agreement alleged by the petitioner is unique.

In *The Law of Admiralty*, Gilmore and Black compare *Union Fish Co.* v. *Erickson* and *Western Fuel* v. *Garcia* and say:

"As to the distinction between state statutes of frauds and state statutes of limitation, the layman who lacks the special insight of justices of the Supreme Court can only say: *Credo quia absurdum est*" (p. 536).

In *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, petitioner, a seaman, was injured while working on respondent's ship and sued for damages. Respondent claimed that a release had extinguished the claim. The jury gave Garrett a verdict but the Court set it aside because he had failed to sustain the burden of proof required under Pennsylvania law to invalidate a release. This Court held only that the law applicable in respect of seamen's releases of maritime claims was Federal, not State.

Statutes of Frauds were long ago conceived as a necessary restraint on a very human tendency to resort to a little "larceny" on occasion to support claims. Seamen have not been noteworthy for any lack of such tendency. To hold Statutes of Frauds inapplicable to such agreements as the one alleged here would expose a shipping industry already sorely beset to a new class of claims in addition to its existing, extreme obligations for Jones Act negligence and for unseaworthiness to the further detriment of a Merchant Marine in fierce competition with foreign flag vessels which do not coddle seamen.

IV.

Respondent is not liable for the consequences of negligent treatment by the Public Health Service.

This is not the case of a seaman left ill and destitute abroad; nor is it a case where the illness was caused by any negligence of respondent or unseaworthiness of its vessel, or even a consequence of his service on the vessel. Respondent gave petitioner a "master's certificate" entitling him to treatment at the Public Health Service hospital and petitioner accepted it and used it. He was fully aware of his rights. In his answers to interrogatories he said:

> "At that time, plaintiff was well aware that the usual duties of a steamship owner or operator were satisfied upon the furnishing of a captain's certificate to a United States Public Health Service hospital • • • " (R. 18).

It is well settled that the shipowner complies with his duty to provide "cure" when he gives the seaman a master's certificate entitling him to treatment at a Public Health Service hospital. The leading case is *The Bouker No. 2*, 241 Fed. 831, certiorari denied 245 U. S. 647. In *Calmar SS Corp.* v. *Taylor*, 303 U. S. 525, this Court cited *The Bouker* and said:

> "Moreover, Courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service" (p. 531).

The Court of Appeals for the Second Circuit has held the same in subsequent cases. *Wilson* v. *United States*, 229

F. 2d 277, 281; *Muruaga* v. *United States*, 172 F. 2d 318; *Bailey* v. *City of New York*, 153 F. 2d 427; *McManus* v. *Marine Transport Lines*, 149 F. 2d 969, certiorari denied 326 U. S. 773; *The Saguache*, 112 F. 2d 482.

The Court of Appeals for the Ninth Circuit follows the same rule. *United States* v. *Loyola*, 161 F. 2d 126; *United States* v. *Johnson*, 160 F. 2d 789; *Van Camp Seafood Co.* v. *Nordyke*, 140 F. 2d 902.

District Court decisions are numerous and the text-writers agree. *Zackey* v. *American Export Lines*, 152 F. Supp. 712 (D. C. N. Y., 1957); *Benton* v. *United Towing Co.*, 120 F. Supp. 638 (D. C. Cal., 1954); *The Alpha*, 44 F. Supp. 809 (D. C. Pa., 1942); *The Law of Seamen* by Norris, pp. 216-17, 221-2; *The Law of Admiralty* by Gilmore and Black, p. 266; *Robinson on Admiralty*, p. 295.

There is no question here of tort-feasor liability to the injured man for the consequences of treatment which a tort caused the man to undergo. Respondent's duty to provide cure arose solely by virtue of its status as petitioner's employer and not because of any wrong. The books can be searched in vain for a case holding a shipowner liable for the consequences of the negligence of a doctor administering "cure," except in the rare case where the doctor was not qualified and the shipowner had reason to know it. That is not the situation here. While the complaint alleges that petitioner held the Public Health Service in low regard, it does not allege that the Public Health Service doctor who treated petitioner and who injured him was incompetent or unqualified, or that respondent had any reason to know that petitioner would not be treated with due care and successfully.

A review of the leading cases on maintenance and cure make the following precepts clear.

1. When a seaman falls ill or is injured in the service of the ship, the shipowner must (with certain exceptions not present here) arrange for the seaman to receive proper medical care and bear such expense as may be involved.

2. In like circumstances the shipowner must provide maintenance for the seaman, i.e. the cost of room and board during the period of "cure" and until the seaman has made as much recovery as is possible.

3. The United States Public Health Service hospitals are open to seamen, gratis, and the shipowner who gives the seaman a master's certificate entitling him to such treatment and, where such is necessary, provides reasonable means for the seaman to get there, has done his full duty as concerns providing "cure."

4. Where there is no negligence on its part or unseaworthiness of its vessel, the shipowner is not liable to the seaman for compensatory damages for his illness or injuries or for any permanent disability or for conscious pain and suffering.

5. Where the shipowner sends the seaman to a private physician rather than to the Public Health Service for treatment, and uses due care in selecting a duly licensed and apparently competent one, it is not liable to the seaman for the consequences of any negligence or malpractice of the doctor. See particularly: *The Sarnia*, 147 Fed. 106 (2 Cir. 1906), *infra*, pp. 27, 28); *The C. S. Holmes*, 209 Fed. 970 (W. D. Wash. 1913), reversed on other grounds, 237 Fed. 785 (9 Cir. 1916, *infra*, pp. 28, 29); *Bonam* v. *Southern Menhaden Corp.*, 284 Fed. 360 (S. D. Fla. 1922, *infra*, p. 30); *Williams* v. *United States*, 133 F. Supp. 319 (E. D. Va. 1955), affirmed 228 F. 2d 129 (4 Cir. 1955, *infra*, pp. 34, 35).

In *Harden* v. *Gordon*, 2 Mason 541, Fed. Cas. No. 6047 (1823), Harden, mate on Gordon's vessel, sought to recover his expenses occasioned by an illness in a foreign port. Mr. Justice Story considered the origin and development of "maintenance and cure." He held that "the maritime law does provide, that the expenses of sick seamen shall be borne by the ship" and that the claim for the expenses of maintenance and cure "constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labour and services of the seamen" (pp. 481, 482).

In *Reed* v. *Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641 (1832), Mr. Justice Story, dealing with another claim for the expenses of maintenance and cure, found the principles to be as follows:

> "* * * * a seaman, who is taken sick, or is injured, or disabled, in the service of the ship, without any fault on his own part, is by the martime law entitled to be healed at the expense of the ship" (p. 427).
>
> "The voyage of the ship must, so far as the seamen are concerned, be deemed to commence, when they are to perform service on board, and to terminate, when they are discharged from farther service. The title to be cured at the expense of the ship is co-extensive with the service in the ship" (p. 428).
>
> "The seaman is to be cured at the expense of the ship, of the sickness or injury sustained in the ship's service. It must be sustained by the party, while in the ship's service; and *he is not to receive any compensation, or allowance for the effects of the injury.* But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for, diet, lodging, nursing, or other assistance, they

are a charge on, and to be borne by, the ship. The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for *expenses* necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, *the owners* are freed from all further liability. They *are not in any just sense liable for consequential damages*" (p. 429, italics ours).

In *The Osceola*, 189 U. S. 158 (1903), the sole question was whether a vessel, in all respects seaworthy, is liable to one of the crew for injuries resulting from a negligent order of the master in respect of the navigation and management of the vessel. In reaching its decision that there was no liability, this Court considered the long prior history of the rights and liabilities of seamen and vessel owners and made certain observations pertinent here. In summing up the Rules of Oleron and the Laws of Wisbuy, this Court said:

"* * * nor does it appear that the seaman is to be indemnified beyond his wages and the expenses of his maintenance and cure" (p. 169).

This Court quoted from the British Merchants' Shipping Act the provision "* * * if the master or any seaman or apprentice receives any hurt or injury in the service of the ship to which he belongs, the expense of providing the necessary surgical and medical advice * * * shall be defrayed by the owner of such ship * * *." and then pointed out that "These provisions of the British law seem to be practically identical with the Continental Codes" (pp. 170-1).

This Court also noted that our statutes were silent on the subject of liability and that in all but a few of the

more recent cases recovery had been "limited to the wages and expenses of maintenance and cure" (p. 172).

This Court referred to *Reed* v. *Canfield, supra,* and quoted Mr. Justice Story's decision that shipowners:

> "* * * are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages" (p. 172).

In *The Iroquois,* 194 U. S. 240 (1904), the seaman was injured at sea but the master elected to continue on to destination rather than divert to a nearer port where it was reasonable to suppose that professional medical treatment was available. This Court considered it a close case but affirmed a decision below awarding damages for the master's failure to divert to the intermediate port to provide proper medical care. This is a far cry from holding a shipowner for the consequences of the malpractice of medical men provided by the shipowner and reasonably believed to be competent.

In *The Sarnia,* 147 Fed. 106 (2 Cir. 1906), the Court squarely held that the shipowner is not liable for injuries sustained due to the negligence of a doctor engaged by the shipowner to treat an injured seaman. There the seaman sustained an apparently minor injury to his hand, due to no negligence on the ship's part, as the ship was preparing to sail from New York. However, the hand was worse when the ship arrived at Kingston six days later and the master called in a shore doctor who treated the injury and advised that it was not necessary to leave the man in a hospital at Kingston. The hand was much worse when the ship reached Port Limon and the master called a competent

surgeon who treated the seaman while the ship was there and advised that it would be safe for him to remain aboard and return to New York. On the return voyage the hand worsened considerably and later became permanently crippled. The Court denied recovery on the seaman's claim that the shipowner was liable for the negligence of the shore doctors. The Court said:

> "If the doctors made some error of diagnosis, as the most competent physicians and surgeons sometimes do, and thus prescribed a treatment not sufficient to insure safe return to the United States, the fault should not be charged to those [ship's officers] who faithfully administered that treatment" (p. 109).
>
> "The doctors may each have made a serious mistake in this particular case, but certainly they were 'competent'" (p. 109).
>
> "To hold the Sarnia responsible upon the record here presented would be to extend the liability of the ship far beyond the point to which it has been carried in any reported case" (p. 110).

In *The C. S. Holmes*, 209 Fed. 970 (W. D. Wash. 1913), reversed on other grounds, 237 Fed. 785 (9 Cir. 1916), certiorari denied, 203 U. S. 588, the seaman suffered a compound fracture of the right arm and the master engaged a shore doctor to provide treatment and "cure." The seaman claimed damages for the doctor's allegedly negligent treatment. The Court held that there is no such liability where the shipowner exercises reasonable care in employing a regularly licensed physician believing him to be competent. The Court said:

> "The master is not negligent when he exercises reasonable care in selecting and employs a regularly licensed

physician, believing him to be competent, and intrusts the injured seaman to his care, in the belief that such physician will render careful and competent treatment" (p. 974).

"Where there is no negligence of the master, the physician's negligence cannot be imputed to him or to the owner, and the vessel cannot be proceeded against in rem" (p. 974).

"The owner is liable for the expense of effecting the cure of a seaman injured in his employ * * *. The liability of the owner to pay for medical treatment, and his liability to pay damages, of which medical treatment is an element, are two different things. The first liability exists from the fact of injury; the second arises only where the owner is at fault either in causing the injury or its treatment" (p. 975).

In *The Bouker No. 2*, 241 Fed. 831 (2 Cir., 1917), certiorari denied, 245 U. S. 647, a tug's engineer fell ill in the service of the tug and was treated ashore by a hospital and a surgeon of his choice. The District Court decreed recovery, for "cure," the amount of the physician's, the surgeon's and the hospital's bills. The Court of Appeals reversed and limited recovery to what cure would have cost if the engineer had gone to the marine hospital. Hough, *J.* wrote for the Court:

"Nor does the liability of the ship extend beyond—'expenses of effecting the cure by ordinary medical means. This does not include extraordinary medical treatment' or treatment after cure is effected as completely as possible in a particular case.'

* * * * *

"We take cognizance of the existence of the Marine Hospital service, where at minimum expense, or (in proper

cases) none, a seaman may be treated. It is not permissible for a person entitled to care from his ship (and equally entitled to have that care bestowed in a Marine Hospital) to deliberately refuse the hospital privilege, and then assert a lien upon his vessel for the increased expense which his whim or taste has created" (p. 835).

In *Bonam* v. *Southern Menhaden Corp.*, 284 Fed. 360 (S. D. Fla. 1922), a seaman sustained a rupture and claimed against the vessel owner for the malpractice of a shoreside physician and surgeon engaged by the vessel owner to treat him. The vessel owner demurred to this count and the Court sustained the demurrer, saying:

"The fourth count alleges negligence of the surgeon performing the operation without allegations bringing home to the defendant knowledge that the surgeon was unskilled" (p. 362).

In *Pacific Steamship Company* v. *Peterson*, 278 U. S. 130 (1928), this Court considered whether the right given to seamen by the Jones Act to recover for injuries caused by negligence was an alternative for maintenance and cure. In concluding that the seamen need not elect between those remedies but, in a proper case, could have both, this Court quoted from *Harden* v. *Gordon*, 2 Mason 541 (which it noted was cited with apparent approval in *The Oscepla*), where Mr. Justice Story said "a claim for the expenses • • • 'constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labor and services of the seamen'" (p. 137). This Court also quoted with obvious approval from *The A. Heaton*, 43 Fed. 592, Mr. Justice Gray's decision that the seamen's right to maintenance and cure, "being 'grounded solely upon the benefit which the ship derives

from his service * * * does not extend to compensation or allowance for the effects of the injury; but it is in the nature of an additional privilege, and not of a substitute for or a restriction of other rights and remedies'" (p. 137).

In *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367 (1932), Santiago contracted pneumonia on board ship and subsequently died. Suit was brought for damages for his death, claimed to have resulted from the failure of the ship's officers to give him medical care and attention while aboard the vessel, allowing him to remain in cold, unsanitary and ill-equipped quarters, providing him with insufficient and improper food, failing to seek aid from passing vessels and failing to send him to a hospital immediately upon arrival in port.* This Court affirmed, but only on the theory that a cause of action for negligence existed under the Jones Act and did not base its decision upon failure to provide maintenance and cure. Again, it is a far cry from the negligence of the ship's personnel in providing proper treatment and the negligence of Public Health Service personnel in committing acts of malpractice during treatment.

In *Calmar S.S. Corp.* v. *Taylor*, 303 U. S. 525 (1938), the seaman had fallen ill of an incurable disease while in the service of the shipowner, not due to any fault of the shipowner, and the Court below had awarded him a lump sum sufficient to defray the cost of maintenance and cure for the remainder of his life. The question before this Court was whether the shipowner's duty to provide maintenance and cure extended over so long and so indefinite a period. This Court held that it did not. In reaching its decision this Court pointed out that maintenance and cure "is not an award of compensation for the disability suffered" (p. 528), and said:

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* Swan, *C.J.* so described the basis of the cause of action. *Cortes* v. *Baltimore Insular Line*, 52 F. 2d 22 at 23.

> "The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial * * *" (p. 531).

This court also referred with approval to *The Bouker No. 2*, 241 Fed. 831, 2 Cir., supra, p. 29 and said:

> "Moreover, courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seamen through recourse to that service" (p. 531).

Socony-Vacuum Co. v. *Smith*, 305 U. S. 424 (1939), dealt only with the question whether assumption of risk is a defense to a claim for Jones Act negligence. This Court did not hold, as petitioner asserts (brief, p. 12), that the consequences of bad medical treatment are not assumed by the seaman.

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239 (1942), did not involve maintenance and cure but only who has the burden of proof in a contest concerning the validity of a seaman's release. Petitioner's assertion (brief, p. 8) that this Court reiterated the fact that the law applicable on actions for maintenance and cure must be liberally construed is erroneous. The Court's reference, p. 248, was to the Jones Act rather than the admiralty rule allowing maintenance and cure—as shown by the Court's reference to *Warner* v. *Goltra*, 293 U. S. 155 and *The Arizona* v. *Anelich*, 298 U. S. 110, which were Jones Act, not maintenance and cure cases.

In *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36 (1943), this Court considered whether Jones Act

liabilities extend to injuries sustained ashore and said that maintenance and cure is "ordinarily measured by wages and the cost of reasonable medical care" (p. 40).

In *De Zon* v. *Amer. President Lines*, 318 U. S. 660 (1943), a seaman employed aboard a passenger ship suffered injuries resulting in the loss of an eye due, as he claimed, to the negligence of the ship's doctor in treating him and failing to have him hospitalized ashore. This Court held that if the doctor were negligent the shipowner would be liable but predicated this liability solely on Jones Act provisions which make the seaman's employer liable to the seaman for the negligence of the employer's other employees.

Aguilar v. *Standard Oil Co.*, 318 U. S. 724 (1943), dealt only with the narrow question whether a seaman is entitled to maintenance and cure in respect of injuries sustained ashore while proceeding to or from the vessel. In considering the nature of "cure," this Court said:

> "Whether by traditional standards he [ship owner] is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship" (p. 730).

Farrell v. *United States*, 336 U. S. 511 (1949), dealt only with the question whether maintenance is payable after the seaman has reached the point of maximum cure and for the balance of his natural life. In considering the nature of maintenance and cure, this Court said:

> "We hold that he [the seaman] is entitled to the usual measure of maintenance and cure at the ship's expense, no less and no more, and turn to the ascertainment of its bounds" (p. 517).

The Court referred to the Shipowner's Liability Convention of 1936, 54 Stat. 1693 and quoted Article 4, ¶1, which provides:

> "The shipowner shall be liable to defray the *expense* of medical care and maintenance * * * " (p. 517, italics ours).

Although the Court considered that the need of the seaman there concerned was "great and his plight most unfortunate," it held that these considerations did not "afford a basis for distortion of the doctrine of maintenance and cure" (p. 519).

In *Williams* v. *United States*, 133 F. Supp. 319 (E. D. Va., 1955), the seaman became afflicted with a mental ailment. Upon the vessel's arrival in port the master made no provision for his treatment and he slipped ashore, where he was taken into custody and committed to the Virginia Central State Hospital. His committee brought suit for damages and maintenance and cure and the Court found that the Central State Hospital was inadequately equipped or staffed to give the seaman proper care. Nevertheless, the Court denied damages for failure to provide proper cure, although it considered that the shipowner had flagrantly abandoned the seaman, because a shipowner is not liable for malpractice unless it has reason to believe that the treating doctor or institute is not adequate. The Court said:

> "In *The C. S. Holmes*, D. C., 209 F. 970, a somewhat similar situation arose with respect to the master of a vessel sending a seaman to an incompetent physician who was, however, licensed by the State of Washington. In holding for the shipowner, the Court said that, in the absence of knowledge of the incompetency of the

physician, the master could presume that reasonable medical care would be afforded" (p. 325).

"• • • the ultimate question resolves itself to the duty, if any, of a shipowner to investigate as to the adequacy of a state-supported institution of this type. In the judgment of this Court, such a rule would impose an undue hardship on shipowners and could readily be carried to an extreme. The claim for damages for failure to provide maintenance and cure is accordingly dismissed" (pp. 326-7).

However, the Court very wisely indicated that, as regards future cure, the shipowner was then on notice of the inadequacy of the Central State Hospital and should do something about it.

The *Williams* case was affirmed, 228 F. 2d 129 (4 Cir. 1955), where the Court said:

"Once Seaman was in this State mental institution, • • • the shipowner was justified in assuming that Seaman would receive ordinary and reasonable care" (p. 133).

This Court denied certiorari, 351 U. S. 986, and petition for a rehearing, 352 U. S. 860.

In *Balancio* v. *United States*, 267 F. 2d 135 (2 Cir., 1959), plaintiff seaman, a civilian employee of the United States, claimed to have suffered injuries while a patient in a Public Health Service hospital undergoing treatment for severe head and skull injuries allegedly sustained in the course of his employment on the vessel. He was entitled to recover for the injuries sustained aboard the vessel under the Federal Employers' Compensation Act, Title 5, U. S. Code §751. The Court held that that was his exclusive remedy. It considered whether the additional injuries al-

legedly sustained due to the negligence of the Public Health Service could be considered consequential and denied recovery.

In *Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911 (2 Cir. 1960), the Court defined "maintenance" as:

> "* * * a living allowance sufficient to enable the seaman to maintain himself in a manner comparable to that which he received aboard ship. * * * Maintenance is related to out-of-pocket expenses and thus is not recoverable for periods during which the seaman receives free room and board at a Marine Hospital. *Calmar SS Corp.* v. *Taylor*, supra; *The Bouker No. 2*, 2 Cir. 1917, 241 F. 831, certiorari denied, 1917, 245 U. S. 647" (italics ours).

The Court said that "cure"

> "relates to the expense of medical treatment. The duty to provide such treatment, however, extends only until the patient reaches the point of maximum recovery. *Calmar SS Corp.* v. *Taylor*, supra, *Farrell* v. *United States*, 1949, 336 U. S. 511" (pp. 914-15, italics ours).

The Law of Admiralty by Gilmore and Black can be searched in vain for any suggestion that the shipowner must pay damages to the seaman for the consequences of malpractice committed by a Public Health Service doctor (pp. 253-71). These authors say:

> "The seaman does not have a free hand in choosing his own physician and deciding on his own treatment. The United States Public Health Service maintains Marine Hospitals at which seamen may receive low cost or free care and treatment. An ill or injured seaman who has been given a 'hospital ticket' by the master and provided with transportation to the nearest Marine

Hospital will usually be held to have acted at his own risk and expense if he either refused to enter the Marine Hospital and to follow the advice of the Public Health Service physicians or if he consults private physicians or enters another hospital" (p. 266).

The Law of Seamen, Vol. 2, by Norris, can likewise be searched in vain for any suggestion that the shipowner is liable for malpractice of the Public Health Service (pp. 123-239). Maintenance and cure is defined as:

"* * * a means of giving a seaman relief by way of affording him medical care and treatment and reimbursing him for the cost of maintaining himself during the convalescent period. It is not an award of compensation for damages for the disability which he suffered. It does not indemnify the seaman for his injury or disability and does not include damages for the pain and suffering which he may have endured" (p. 147).

"Neither the shipowner nor the vessel is an insurer of the health of the seaman and his sickness not caused by his employment, does not create any liability of the shipowner beyond that of providing maintenance and cure. This obligation is discharged when the shipowner has provided actual maintenance and cure, or its equivalent in money, up to the time when the seaman has recovered from his disability to the extent that it is reasonable to believe recovery under treatment is possible. The shipowner or vessel does not become an insurer with respect to the duty to cure the seaman for cure means care and not a positive cure which may be impossible" (pp. 179-80).

This author negatives the idea that the shipowner who sends the seaman to a doctor reasonably believed to be

licensed and competent can be liable for the doctor's mistakes. He says:

> "When the vessel is in port, the master is not negligent when he exercises reasonable care in selecting and employing a practicing physician believing him to be competent and entrusts the injured seaman to his care in the belief that such physician will render careful and competent treatment. A shoreside licensed physician may be 'competent' in so far as the vessel's liability to the seaman is concerned even though he may make a serious mistake in the diagnosis or treatment of the sick or injured seaman" (pp. 212-13).

> "When a master relies upon a shoreside doctor's advice to the effect that the seaman does not require hospitalization and can continue on the voyage, receiving medical care which the ship affords and being relieved of all duties, it has been held that the vessel was exonerated from liability although the advice was erroneous and the seaman suffered serious injury as a result" (p. 216).

Concerning the Public Health Service hospitals, the author writes:

> "It is common knowledge among shipping men and seamen that United States Marine Hospitals located at principal seaport cities in the United States are open to seafarers who require hospitalization, medical, dental or surgical treatment.
>
> "These hospitals are in large, modern, airy buildings and are generally equipped to take care of most medical and surgical cases. The hospital staffs are members of the United States Public Health Service and are government employees . . . " (pp. 216-17).

"The weight of authority is to the effect that where an offer of hospital services is made to a seaman by the master or ship's officer designated by him and the seaman refuses to avail himself of hospital treatment and care, the owner of the vessel is relieved of the obligation of payment of maintenance and cure (p. 223).

In his dissenting opinion in *De Zon* v. *Amer. President Lines*, 318 U. S. 660, supra, p. 33, Mr. Justice Black said:

"The United States Marine Hospital in Honolulu had all the facilities which the ship lacked. These hospitals are recognized government institutions and a seaman has no burden to prove that the equipment and treatment in the hospital would have been better than the equipment and tratment on the ship" (p. 673).

V.

The judgment appealed from should be affirmed.

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Dated: New York, N. Y.
November 18, 1960

APPENDIX

Alabama—1940 Code, Title 20, §3.
Alaska—Session Laws 1955, Ch. 96.
Arizona—Revised Stats. 1956, §44-101.
Arkansas—Statutes, 1947, Ch. 38, §§101, 104.

Calif.—Civil Code 1624.
Colorado—Revised Stats., Ch. 59, §1-12 et seq.
Conn.—General Stats. Rev. 1958, 52-550.

Delaware—Code, Title 6, §2714.
Dist. of Col.—Code §12-302.

Florida—Statutes 1959, §725.01.

Georgia—Code §20-401.

Hawaii—Revised Laws 1955, Ch. 190.

Idaho—Code 1946, Title Ch. 9, §505.
Illinois—Revised Stats. 1959, Ch. 59, §1.
Indiana—Burns Indiana Stats. Annotated of 1933, §33-101.
Iowa—Code 1958, Ch. 554, §4; Ch. 622, §32-35.

Kansas—General Stats. (1949), Ch. 33, §106.
Kentucky—Revised Stats. Official Edition, Ch. 371, §010.
Louisiana—No Stat. F as such but analogous provision: Rev. Civil Code, Art. 2278.

Maine—Revised Stats. 1954, Ch. 119.
Maryland—Michie's Code 1957, Ed. Art. 35, §36.
Mass.—General Laws, Tercentinary Edition 1932, Ch. 259, §1.
Michigan—Compiled Laws 1948, §§440.4; 566.106, 132.
Minnesota—Stats. 1957, Ch. 513, §01.
Mississippi—Code of 1942, Ch. 264.
Missouri—Revised Stats. 1949, §432.010.
Montana—Revised Code 1947, §13-606.

Nebraska—Revised Stats. 1943, §36-202.
Nevada—Revised Stats., §111.220.
New Hampshire—Revised Stats. Annotated 1955, Ch. 506, §§1-2.
New Jersey—Revised Stats., Title 25, Ch. 1, §5.
New Mexico—Adopted as part of common law. 4 N. M. 168; 16 Pac. 275.
New York—Pers. Prop. Law, §31.
North Carolina—General Stats. 1943, Ch. 22, §1.
North Dakota—Revised Code 1943, Ch. 9, §0604.
Ohio—Baldwin's Revised Code Annotated, 1953 Edition, §1335.05.
Oklahoma—Stats. 1951, Title 15, §136.
Oregon—Revised Stats. 1953, §§93.020, 41.580.
Pennsylvania—Purdon's Pennsylvania Stats. Annotated, Title 33, §§3, 4.
Rhode Island—General Laws 1956, Ch. 9.1.4.
South Carolina—Code of Laws of S. C. 1952, Title 11, §101.
South Dakota—Adopted as part of common law, 224 N. W. 949; 55 S. D. 68.
Tennessee—Official Tenn. Code Annotated (1956), §23-201.
Texas—Vernon's Texas Stats. 1948, Art. 3995.
Utah—Utah Code Annotated 1953, Title 25, Ch. 5.
Vermont—Vermont Stats. Annotated (1959), Title 12, §182.
Virginia—Code of Va., §11-2.
Virgin Islands—Code Annotated (1957), Title 28, §§241-246.
Washington—Revised Code, §§19.36, 0.10.
West Virginia—Michie's West Virginia Code, Ch. 36, Art. 1, §3; Ch. 55, Art. 1, §1.
Wisconsin—Stats. (1957), Ch. 241, §02.
Wyoming—Compiled Stats. (1945), Ch. 5, §101.